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From:

Sent: Thursday, June 16, 2011 15:26:58

To:

Cc:

Subject: Authorities

Dear

Following up on my telephone conversations with _____ and in advance of our teleconference tomorrow morning, here is authority to support two of the positions I explained: (1) that IRC § 6432(a)(2) imposes personal liability only on transferees who receive non-probate property (i.e., property that's included in the decedent's estate by operation of IRC §§ 2034-2042, inclusive); and (2) that the special estate tax lien imposed by IRC § 6324(a) is unaffected by a sale to even a good-faith purchaser. Note that since personal liability only attaches to non probate property, and only that property results in a like lien on transfer, where there's no non-probate property, there can't be any like lien.

I've attached copies of these authorities, but to whet your appetite, I'll include the pertinent quotes here. I'm looking forward to our conversation tomorrow, and I hope this information is helpful.

Best,

Issue 1: IRC § 6324(a)(2) is limited to non-probate assets only:

1.

The special lien for estate and gift taxes created by section 6324(a) does not have to be recorded in order to be effective. United States v. Vohland, 675 F.2d 1071 (9th Cir. 1982).

* * * * *

The personal liability of a transferee under section 6324(a)(2), however, extends only to those who have received assets of a decedent's estate which are includable for Federal estate tax purposes under the provisions

of sections 2034 to 2042, inclusive (broadly speaking, assets which pass outside the decedent's probate estate).

Eggleston v. Commissioner, T.C. Memo 1985-327 (1985), citing Street v. United States, 310 F. Supp. 657 (S.D. Tex. 1969).

2.

Section 6324(a)(2) states that where property is included in the gross estate pursuant to sections 2034 through 2042, the transferee of the property (such as a surviving joint tenant or remainderman beneficiary) automatically becomes personally liable for the estate tax to the extent of the date of death value of the property received. Such a person is also considered a transferee under section 6901(h), thereby permitting the liability created by section 6324(a)(2) to be assessed and collected according to the rules specified in section 6901. Thus, substantive transferee liability with respect to nonprobate assets is ordinarily supplied by section 6324(a)(2), making an examination of state law unnecessary. See Schuster v. Commissioner, 312 F.2d 311, 314-316 (9th Cir. 1962), affg. 32 T.C. 998 (1959) and revg. on another issue 32 T.C. 1017 (1959); Groetzinger v. Commissioner, 69 T.C. 309, 316-317 (1977); Bergman v. Commissioner, 66 T.C. 887, 892 (1976).

Magill v. Commissioner, T.C. Memo. 1982-148, affd. sub nom Magill v. Commissioner, 729 F.2d 496 (7th Cir. 1984)

3.

Section 6324(a)(2) gives the government a lien for unpaid estate taxes over property held by transferees of property "included in the gross estate under sections 2034 to 2042, inclusive" Those sections govern various forms of nonprobate property that is subject to estate tax despite the fact that it need not pass through probate. See 26 U.S.C. § 2034 (dower or curtesy interests); 26 U.S.C. § 2035 (gifts made within three years of death); 26 U.S.C. § 2036 (transfers with a retained life estate); 26 U.S.C. § 2037 (transfers that take effect at death); 26 U.S.C. § 2038 (revocable transfers); 26 U.S.C. § 2039 (annuities); 26 U.S.C. § 2040 (joint interests); 26 U.S.C. § 2041 (powers of appointment); 26 U.S.C. § 2042 (proceeds from life insurance). In this case, the partnership interest to which the lien was attached does not even arguably fall within any of the types of property governed by §§ 2034-42, but is, rather, governed by 26 U.S.C. § 2033, which applies to probate property. Accordingly, the provisions of 26 U.S.C. § 6324(a)(2) simply do not apply.

Beatty v. United States, 937 F.2d 288, 291 (6th Cir. 1991)

4.

26 U.S.C. § 6324(a)(1) provides for a federal tax lien upon the gross estate of a decedent for ten years after the date of death. Id. In this case, the federal estate tax lien expired on October 25, 2003. However, 26 U.S.C. § 6324(a)(2) also imposes personal liability for any unpaid federal estate tax on a trustee or a transferee who receives, or has on the date of the decedent's death, property included in the gross estate under 26 U.S.C. §§ 2034 to 2042, to the extent of the value, at the time of the decedent's death, of such property. See 26 U.S.C. § 6324(a)(2); 26 C.F.R. § 301.6324-1. The personal liability provided for in 26 U.S.C. § 6324(a)(2) applies only to the beneficiaries of non-probate assets. See 26 U.S.C. § 6324(a)(2); see also Roe v. Farrell's Estate, 69 Ill. 2d 525, 372 N.E.2d 662, 14 Ill. Dec. 466 (Ill. 1978) (federal estate tax is imposed on transfer of taxable estate as a whole; if a decedent's probate assets are insufficient to satisfy federal estate tax, persons holding non-probate assets, included by law in federal gross estate, are liable to the extent of the value of those assets, and the tax becomes a lien against those assets if the tax is not satisfied in full).

Personal liability, assessed pursuant to 26 U.S.C. § 6324(a)(2), may be asserted without a transferee assessment under 26 U.S.C. § 6901, and after the expiration of the ten year estate tax lien provided for in 26 U.S.C. 6324(a)(1), since the period of limitations in which to assert this liability in federal district court is measured by the collection limitations period applicable to the transferor estate. See United States v. DeGroft, 539 F.Supp. 42 (S. Md. 1981); see also United States v. Geniviva, 16 F.3d 522 (3rd Cir. 1994) and United States v. Russell, 532 F.2d 175 (10th Cir. 1976) (both holding that transferee assessment limitations provision contained in 26 U.S.C. § 6901(c) is not applicable to, nor a bar to pursuing, the 26 U.S.C. § 6324(a)(2) personal liability of a non-probate property holder or transferee in federal district court and that a transferee assessment pursuant to 26 U.S.C. § 6901 is not a prerequisite to such an action); United States v. Botefuhr, 309 F.3d 1263 (10th Cir. 2002) (the ten years lien in the parallel 26 U.S.C. 6324(b) gift tax provision does not create a statute of limitations for collecting gift taxes from the personally liable donee-transferees).

United States v. Bevan, 2008 U.S. Dist. LEXIS 102939, 15-17 (E.D. Cal. 2008)

Issue 2: Absent a discharge, the IRC § 6324(a)(1) lien remains on estate property, even after it's sold to BFP/V; caveat emptor:

1.

The question is whether a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor who acquires an interest in property includible in the gross estate of a decedent under section 2033 of the Internal Revenue Code of 1954 (often referred to as "probate property") is protected against the Federal estate tax lien imposed by section 6324 (a) (1) of the Code in a case where the Government has not filed the notice of lien referred to in section 6323 (a) of the Code.

* * * * *

Therefore, a purchaser, holder of a security interest, mechanic's lienor, or a judgment lien creditor who acquires an interest in property includible in the gross estate of a decedent under section 2033 of the Code is not protected against the Federal estate tax lien imposed by section 6324 (a) (1), except as such protection may be specifically provided in section 6324 of the Code.

Rev. Rul. 69-23; 1969-1 C.B. 302

2.

Section 6324(a)(2) provides that upon the transfer of non-probate property to a purchaser, the property is divested of the Federal estate tax lien. See Rev. Rul. 69-23, 1961-1 C.B. 302 (1969). See also United States v. Vohland, 675 F.2d at 1075. The property at issue, however, was part of Esther Sousa's probate estate. Property which is part of the probate estate is divested of the Federal lien upon transfer to a subsequent purchaser only if the estate's fiduciary is discharged from personal liability pursuant to I.R.C. § 2204 (1970). See I.R.C. § 6324(a)(3) (1976), Rev. Rul. 69-23, 1969-1 C.B. 302 (1969). See also United States v. Vohland, supra at 1075.

Fall River Sav. Bank v. Callahan, 18 Mass. App. Ct. 76, 80 (Mass. App. Ct. 1984)

3.

26 U.S.C. § 6324(a)(1) provides that, if the estate tax is not paid (or otherwise discharged by the passage of time) "it shall be a lien upon the gross estate of the decedent for 10 years from the date of death" The special estate tax lien differs from the § 6321 general tax lien in two important respects. In one respect, the estate tax lien is stronger than the general tax lien. Under 26 U.S.C. § 6323(a), the general tax lien is not good against bona fide purchasers or other interest-holders unless the government perfects its interest by filing in the manner prescribed by 26 U.S.C. § 6323(f). The estate tax lien, by contrast, attaches to the property by operation of law and does not require filing to be good against innocent

third parties. The estate tax lien is, however, weaker in that it lasts for ten years, while the general tax lien has no set duration--it lasts until the underlying tax is either paid or becomes unenforceable by lapse of time. 26 U.S.C. § 6322.

Beatty v. United States, 937 F.2d 288, 290 (6th Cir. 1991)